Supreme Court, U.S.
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No. 10-558

In The

Supreme Court of the United States

Belinda Saunders,

Petitioner,

v.

Emory Healthcare, Inc.

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals of the Eleventh Circuit

PETITION FOR WRIT OF CERTIOPARI

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QUESTIONS PRESENTED

1. In determining whether to grant summary judgment as a matter of law under Fed. R. Civ. P. 56, should a District Judge and Court of Appeals review all of the evidence in the record and draw all reasonable inferences in favor of the nonmoving party?

2. Whether the District Court and Court of Appeals, should consider or disregard evidence, a declaration/hearsay statement from an interested employee, in passing from the moving party on a motion for summary judgment?

3. Whether petitioner had to meet the following standards to survive summary judgment as a matter of law, *including prima facie*: the petitioner has to show direct evidence of discrimination; the petitioner has to meet the employer's reason head on and rebut it; and show that the disparities between the successful applicant's and her own qualifications were of such weight and significance that no reasonable person in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff?

4. In determining whether to grant summary judgment as a matter of law under Fed. R. Civ. P. 56, should the District Court and the Court of Appeals divide several retaliatory acts into separate groups and then weigh the level of actionable retaliation into groups to make its determining?

5. In determining whether a hostile work environment is actionable the conduct in question must be severe or pervasive enough to create an objective hostile or abusive and then also determine whether petitioners subjectively perceived the environment to be abusive in order to survive summary judgment?

6. Whether the Courts and its Officers impartial practices; procedural impropriety and the mismanagement of the proceedings/case caused a miscarriage of justice and deprived and prejudiced the party rights to statutory procedural and substantive due process of the law under the 5th Amendment of the Constitution?

LIST OF PARTIES

The following is a list of all the parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Belinda Saunders, Plaintiff/Appellant;

2. Emory Healthcare, Inc., Defendant/Appellee:

3. Belinda Saunders, Pro Se

4. John S. Snelling and Toni J. Read of Duane Morris LLP., for Defendant/Appellant.

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No.

In The

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Belinda Saunders,

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v.

Emory Healthcare, Inc.

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals of the Eleventh Circuit

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

The Opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The Opinion of the United States district court appears at Appendix B to the petition and is unpublished.

The Order of the United States district court appears at Appendix C to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals of the Eleventh Circuit decided my case was January 11, 2010. A timely petition for Rehearing En Banc was denied by the United States Court of Appeals on the

following Date: May 26, 2010, and a copy of the order denying Rehearing En Banc appears at Appendix A. An extension of time to file the petition for a Writ of Certiorari was granted to and including October 23, 2010 on June 23, 2010 in Application No. 09A1252. The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, including the Civil Rights Act of 1991; 42 U.S.C § 1981

STATEMENT OF THE CASE

Petitioner filed her initial EEOC Charge on August 24, 2005 and then filed an Amended Charge on March 24, 2006. The EEOC determined through evidence that petitioner was more likely than not denied the promotion because of her race (Black) and petitioner was retaliated against for filling an EEOC charge. Since 2005, 1 Magistrate; 6 Judges; over 200 pleadings and briefs filed in the District Court; over 10 pleadings filed in the Eleventh Circuit; and countless monies spent that petitioner did not have, petitioner is still trying to get her evidence in, considered and reviewed fairly. When petitioner reads both

Courts Opinions in her case, she is in disbelieve as to how they make up events, mischaracterize events and evidence. Petitioner hopes that this Court grants her the Writ of Certiorari, so that she may state to this Court, with evidence, what has happened to her in the Eleventh Circuit's jurisdiction. Petitioner was left on her own, because no officer of the court in that jurisdiction wanted to take her case due to the relationship between Judge Duffey and Kent Alexander. Although petitioner has an abundance of evidence, both Attorney 's she had flat out refused to engage in discovery. I actually caught the last attorneys stating they did not have petitioners evidence the whole while they were sitting on it. Petitioner believes her case has been directly affected by the relationships and associations of the following listed person and entities which include: Kent Alexander, Senior *Vice President and General Counsel of Emory Healthcare, Inc., and Emory University*; William S. Duffey, Jr., *Judge for U.S. District Court For The Northern District of Georgia Atlanta Divison*;

Both Judge Duffey and Kent Alexander, at the same time, worked for King & Spalding LLC and they both were Attorney Generals for the State of Georgia. Furthermore they both retired from the King & Spalding LLC.,; Emory Healthcare, Inc., Defendant-*Appellee*; K&S *Investments* in which Judge Duffey has an economic stake and probably Alexander as well, because he retired from the same law firm.; and King & Spalding, LLC., *its representation of Emory as a client*.

These relationships and association has had a direct impact and affect on her constitutional rights. Petitioner has let the District Court know this throughout her case. She respectfully asked Judge Duffey if his impartiality might be reasonably questioned because he worked as an associate and partner and retired from the King & Spalding/K&S, in which Emory Healthcare, Inc., was and is a client of the law firm. Before Judge Duffey ruled on EHC's Motion for Summary Judgment, Petitioner objected and expressed to Judge Duffey that she believes that his

relationships and associations with Kent Alexander, Senior Vice President and General Counsel for Emory Healthcare, Inc., and Emory University as a former co-worker of Judge Duffey for 25 years at King and Spalding of Atlanta where Emory Healthcare, Inc., and Emory University is still a client today has had a direct impact on the adjudication of her case in the District Court. (R12-153-10)

US citizens must have faith in our judicial system, "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety." (Model Code of Judicial Conduct, Canon 2) Furthermore, "Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law."(Model Code of Judicial Conduct, Canon 1)

Furthermore, petitioner did not ask Judge Duffey to edit or revise her discovery requests, but on April 7, 2008, immediately upon reading the District Courts order, petitioner filed an Objection and Emergency Motion for an Extension of Time to take depositions, (R16-176-Ex.7) because she would not have defendant's production of documents or response to the District Court's interrogatories in which to use at Sampsel, Mitchell, and Margolis depositions that the District Court ordered and scheduled for April 10 and April 11. (R8-114) Petitioner did not have respondents' production of documents or responses to the District Court's interrogatories in which to use at Sampsel, Mitchell, and Margolis depositions.

On 4/9/2008, the District Court, by docket entry only denied petitioner her emergency motion holding,

> **As per Ms. Saunders e-mail on 4/7/2008, the Court instructed the parties to move forward with the depositions. Therefore, 114 Motion for Extension of Time is DENIED.**

The next day on 4/10/2008, the District Court entered an Order placing limitations on discovery ordering,

> **"The Court has, therefore, reviewed and edited the Plaintiff's amended discovery requests as follows. Defendant shall respond to the following interrogatories and requests for production of documents, in accordance with the "Definitions and Instructions" stated in the Plaintiff's Amended Interrogatories and Requests for Production of Documents, within thirty (30) days of the date of this Order. Defendant shall not be required to respond to any further discovery requests pursuant to Rule 33 and 34 without leave of Court. Discovery in this case shall close on May 10, 2008." (R8-116)**

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted since the District Court and Eleventh Circuit as a matter of law did not review or make its determinations on all of the evidence in the record and only drew all reasonable inferences in favor of the moving party which is inconsistent under the statuary law of the Fed. R. Civ. P. 56 and the standards of this Court in granting summary judgment.

Respondent moved to strike petitioners exhibits attached to her Summary Judgment Response for Lack of Authentication; it did not identify any exhibits it wanted struck. (R15-159) Respondent states that petitioner, "in violation of Rule 56(e)", attaches numerous unauthenticated exhibits to her responses to its move for summary judgment. District Court stated and holds that petitioner had to authenticate her evidence through using an affidavit in opposing to respondents motion for summary judgment. (R15-167-16)(R15-159-1) (R15-167-15) It supported its ruling with the Fed. R. of Civ. P. 56(e) and (Burnett v. Stagner Hotel Courts, Inc., 821 F. Supp. 678, 683 (N.D. Ga. 1993)

To petitioner understanding pursuant to 56(e), she was not obligated to file an affidavit in support of her opposition to respondent's motion for summary judgment. According to Rule 56 (e), "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits "or" as otherwise provided in this rule — set out specific facts showing a genuine issue for trial". Fed. R. Civ. P. Rules 56 (a) and (b) clearly states, "with or without supporting *affidavits*"

In the District Court granting the respondent its motion in part, it took an extremely severe and cruel approach by striking and not considering the petitioners exhibits attached to her Response brief; Statement of Additional Facts; and Response to the Respondents Statement of Undisputed Material Facts. Although the District Court struck petitioners exhibits/documents produced to the petitioner through discovery from the respondent, EEOC, and FIOA requests, the District Court still per this Court standards and Fed. R. Civ. P. 56 was

still obligated to review and consider exhibits/ evidence it did not strike and that it deemed as authentic and admissible from the record which are: the documents attached to petitioners Declaration, including those grouped as Exhibit A; (Op. at 16-17); the 3 depositions taken by petitioner, *including the evidence/documents attached to each deposition*, of the respondents upper management employees: Sampsel, Mitchell and Margolis which cost petitioner over $1,500.00 dollars to depose. (Op. at fn 17).

Magistrate Judge Brill ruled in her Scheduling and Instructions Regarding Summary Judgment Motions Order dated March 27, 2007,

> **"The original (or a complete copy) of all depositions that are referred to by either party in support of, or in opposition to, a motion for Summary Judgment shall be filed with the Court. Copies of individual depositions pages referred to in the parties' memoranda of law need not be attached to the memoranda or otherwise submitted in a separate form." (Op. at 5,6)**

Both petitioner and respondent filed their individual original depositions and the same Notices of filing of original depositions with the District Court. (R10-129-134-135-136-137-138-139-140-141) They are all on the docket report for the District Court. Petitioner went directly from thompson Reporting Services, Inc., to the District Court and filed her 3 sealed original depositions with exhibits attached just as the respondent did.

Moreover, in open Court Judge Duffey arranged and set up all 4 of the depositions for petitioner and respondent. (R17-113-20-24) Petitioner and respondent used the same reporting company, thompson Reporting Services, Inc., and with the same Certified Court Reporter, Presa L. Gibbs, in the same conference room, and at the same location at respondent's counsels Law Offices, Duane Morris, LLP. in downtown Atlanta, GA. (R10-129-134-135-136-137-138-139-140-141)

Respondents lead counsel, Snelling, was present at all 4 depositions and he and the witnesses including petitioner, reviewed all of documents/evidence that petitioner put forth during the depositions. (R10-129-134-135-136-137-138-139-140-141) Judge Duffey said that he would be available for each deposition, but he was not present for any of the depositions. (R17-113-23) All the documents/ evidence presented during the 3 depositions petitioner gave which cost her over $1,500.00 to depose, respondent's upper management employees, Sampsel, Mitchell and Margolis were authenticated by petitioner and the deponents at the same time, under oath.

The District Court made reference to petitioners evidence , *the 3 depositions take by petitioner*, on only 6 occasions throughout its entire Order citing Margolis dep. (R15-167-10); Sampsel dep. (R15-167-21); Margolis dep. (R15-167-23); Margolis dep. (R15-167-23); Margolis dep. (R15-167-30); Mitchell dep. Exh. 31, (R15-167-32); and Mitchell dep. (R15-167-33). On each citing, the District

Court used petitioners 3 depositions pages and exhibits in the light most favorable to the respondent. (Op. at pgs. 1-68)

As petitioner pointed out to the Eleventh Circuit, Judge Duffey made a huge amount of statement on his order about evidence that was not produced by the respondent, but by petitioner. Petitioner can list numerous examples that are in its order, but the following example clearly stands out in the District Courts Order. Judge Duffey states that the Hiring Manager Interview Guide for a Professional Leader packets used by the 6 panelists for petitioners and Sampsels interview for the ANM position that include scores sheets are located at SUMF ¶ 33; Margolis Decl. ¶ 12, Exh. 2; Pl.'s Dep., Exh. 43; (R15-167-28) this is clearly not true; respondent never did offer or attach the interviewing packets into its evidence to support it motion for summary judgment nor are they attached to petitioners declaration or Margolis declaration. As Petitioner stated to the Eleventh Circuit, she did file the

interviewing packets to support her opposition and they can be found at (R10-136-Ehx. 43). The District Court was required, *per the law*, to review the evidence in like most favorable to the non movant which is petitioner. It is clear that Judge Duffey selectively used petitioner's evidence in his determination and he prejudicially and heavily used respondent's 8 hours deposing of the petitioner and the Margolis Declaration to support all of his determinations in the light most favorable to the respondent.

Although the District Court determined to in-part strike the petitioners evidence; it refused to consider the petitioners evidence that it did not strike; which in deed caused petitioner substantial prejudicial effect on all of her claims. The petitioner has argued the above in her Appellant's Briefs to the Eleventh Circuit. Petitioner believes that District Court failed and ignored the very evidence that it deemed properly authenticated in its determination. Petitioner believes that she did not get a De Novo review from the Eleventh Circuits. The Eleventh

Circuit repeated what the District Court states in its order and states, petitioner further arguments are unavailing." The Eleventh Circuits review and determinations were vague in that it seems it only agreed with the District Court on everything. (Op. at pgs. 1-16)

Petitioners evidence is authenticated through her amended initial disclose that she attached as attachment C to her initial disclosures. Petitioner clearly purports many of her documents and, in detail, identifies by bate stamps 000001-000719 and described each documents/evidence that she will use to support her claims. She even produced copies of the documents listed on Attachment C to the District Court and filed a certificate with the District Court and served them on respondents counsel. Judge Duffey allowed petitioner initial disclose to stand without opposition from respondent in open Court on March 13, 2008. (V17-28)

The District Court abused it discretion and erred as a matter of law not only in regards to the law it rested on 56(e) in making its determination to strike petitioner's authenticated and admissible evidence, but in that it **did not** review or consider petitioner's evidence that it stated was authenticated and admissible in support of her opposition. The District Court and the Eleventh Circuit ignored and failed to consider petitioners evidence on her claims; therefore, erred as a matter of law in not following Fed. R. Civ. P. 56 and this Court established standard for granting or denying summary judgment. A Court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000)

Lastly, 99% of the petitioner's response in opposition to summary judgment is supported by "in court" under oath depositions from the respondent's upper management

employees which are authenticated by sworn testimony from the deponents and petitioner. Furthermore, the majority of documents in the depositions were self authenticating per the Federal Rules of Evidence 901 and 902, because they came from either the respondent, EEOC, and FIOA requests.

In Reeves this Courts clearly states, "In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole."

II. Certiorari should be granted because District Court and Eleventh Circuit allowed and weighed the a declaration/hearsay statement from an interested employee, in passing from the moving party on a motion for summary judgment conflicts with this Courts standards established in Reeves vs. Sanderson's plumbing and the Fed. R. Civ. P.

The District Court base it determination to allow the Declaration of Marilyn Margolis, as evidence to respondent motion for summary judgment holding in its Order,

> **"The Court may accept Margolis' testimony of her personal knowledge as evidence supporting summary judgment. To the extent Plaintiff wishes to controvert that evidence, she was permitted to do so with competing affidavit complying with Federal Rule 56. She elected not to file a competing affidavit."..."Plaintiff was permitted to submit affidavits of her own to dispute the Margolis testimony, which she did not do." (Op. at p. 10-20)**

The District Court also stated, **"On its face Margolis Declaration indicates that Margolis testified from the personal knowledge required by Rule 56." (Op. at p. 10-20)**

The Eleventh Circuit stated in its opinion, **"In Macuba, this Court stated that "a district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form." Id. At 1323 (internal quotation marks omitted." (Op. at p. 5)**

The Eleventh Circuit and the District Court failed and ignored the petitioners Motion to Strike and Objections, *which did not only motion to strike the Margolis declaration, but also the respondent's exhibits 9-35, notes to file, attached to the deposition of petitioner by respondent.*

Petitioner put forth several reasons backed by Marilyn Margolis in court testimony during a deposition taken by petitioner the following:

In paragraph 6 of Margolis declaration, she stated that under the respondents policies, neither being referred to a communication class nor receiving a verbal warning have any effect on an employee's compensation or her ability to transfer or to be promoted. Again as I pointed out to both courts, she is untrustworthy, because in the respondents Salary Administration Policy and Procedure it states that employees salary are under the Performance Advantage which is for managing performance. The employee performances which include discipline are directly evaluated by the employee's supervisor which has a direct impact on employee's pay raises. The leader scores the employee on their Annual Review/evaluation then the employee is given a (performance link to an award), annual percentage increase/raises in pay are based on their Annual

Review. Exhibit B: (Margolis Dep. Ex.34 bate stamp p.001166; and Ex.17, bate stamp.00077)

Petitioner also showed the Eleventh Circuit and District Court that statements made by Margolis in her declaration are untruthful. (R12-152-1-25) For example; in paragraph 15 Margolis states, "As of December 2006, Ms. Saunders' hourly salary was $ 35.77. The highest paid Level IV nurse in the ED was Sharon Friday, who is black, and who earned $ 40.19 per hour. The two lowest paid Level IV nurses in the ED are white. Sam Shartar earned $ 33.69 per hour and Barbara Muller-Feldman earned $ 34.58 per hour." As petitioners pointed out in her objection and motion to strike, directing the District Court to her evidence that petitioner, in 2006, hourly salary was $32.33 and Sharon Friday's salary was $34. 04 dollars. A black nurse is not and was not the highest paid nurse in the ED. The highest paid nurse is a white female named Whitney Godwin in the amount of $35.47 per hour. (R12-153-Ex. A, 370030) (R12-152-Ex.T)

The respondents exhibit A, to its Motion for summary judgment, is inadmissible hearsay and the respondent should not be allowed to rely on the hearsay exception rule 803 (6) because as the petitioner have shown both courts the Margolis declaration clearly lack trustworthiness. The Fed. R. Evid., 803(6) clearly states, "Unless the source of information or the method or circumstances of preparation indicate lack or trustworthiness.

Petitioner also moved to strike with objections respondent's exhibits 9-35. Respondent's exhibits are not part of any record maintained together on petitioner, because they are all individual notes to file with no signature or computer medata to make them legally sufficient, adequate or trustworthy, or authenticated. (R12-152-1-25) The District Court holds that Margolis authenticated the respondent's exhibits 9-35 of its deposition of petitioner's, but neither Margolis nor the respondent attached the 9-35 exhibits (notes to file) to the

Margolis Declaration or the respondent's motion for summary judgment. (R10-128) (R10-128-Exh.-A) The District Court ruled, **"Defendant attached two exhibits to the Margolis Declaration, and Margolis testifies in her declaration as to the authenticity of Exhibits 9-35 of the exhibits shown at Plaintiff's deposition." (Op. at 10)** and the Eleventh Circuit rules in petitioner's disbelieve,

> **"To the extent that Saunders argues that the Margolis Declaration should have been stricken based on inconsistencies with the record, Saunders has not supported that argument. Therefore, the district court did abuse its discretion by refusing to strike the Margolis Declaration. It is not a typo; it does not state did not. The Eleventh circuit goes on to rule, "Saunders argues that Exhibits 9-35 of her own deposition should be stricken. Because Saunders' motion to strike focused only on the Margolis Declaration and not Exhibit 9-35, this Court will not consider that argument for the first time on appeal. See Bryant v. Jones, 575 F.3d 1281, 1308 (11 th Cir. 2009) ("It is well established in this circuit that, absent extraordinary circumstances, legal theories and arguments not raised squarely before the district court cannot be broached for the first time on appeal."). (Op. at 6)**

In regards to the exhibits 9-35, the petitioner put forth the following about the exhibits 9-35 which is backed by depositions from the respondents own employees, in court, testimony taken by petitioner:

When the petitioner asked Margolis did she know who did the chronological behavioral file on the petitioner for the respondent's statement to EEOC she replied, "No!, I've never seen them." (Margolis Dep. p. 82., lns. 13-21) Margolis states that she did not know what was in the plaintiff's files and Ms. Margolis states that she never even seen the alleged chronological that she allegedly maintain on the plaintiff for over 8 years, but the 33 page chronological, 9-35 exhibits, on the petitioner has her name on the top left hand corner of each page, but she has never seen it before. (Margolis Dep. p. 84, lns. 10-13) The audacity for the respondent to take documents out of this fraudulent, 33 page, chronological document and present it as exhibits and explanations for counseling and reprimands that they did not give to the petitioner over the course of

her employment is criminal. (Margolis Dep., Ex. 54, bates stamp No.'s 001069-001103; Ex. 24., bates stamp No.'s001073-001074.

Marilyn Margolis, Administrator/Director of two of the respondents emergency rooms and the petitioners subsequent supervisors did not write the exhibits 9-35 of the petitioners deposition or the so called standard employee chronology, because the respondents in house counsel, Associate General Counsel, Elizabeth R. Clark-Morrison "Beth" fraudulently wrote and cooked up these behavioral issues which were placed in the petitioners Human Resource and departmental files. In Ms. Clark – Morrison's e-mail she states, "(1) Since our submission of the 12/9/2005position statement, have there been only three "events" with Saunders – etc... (2) Regarding the 12/14 verbal counseling, was the counseling documented? If so, please provide me a copy so that I can describe the meeting in more details etc... (3) etc... (4) I want to present these issues in more of a chronological format to the investigator

in the EHC's Statement of position, and then address Saunders's ludicrous specific claims in EHC's "Response to the Charge." (Margolis Dep. Ex. 15) Furthermore, Margolis was not the petitioners direct supervisor for the years 1997,1998, 1999, 2002, 2003, 2004, 2005, 2006, and 2007. Petitioner was not obligated to file an affidavit to dispute Margolis declaration. She filed a 27 page motion to strike and objections with exhibits A thru V to support her claims. Petitioner believes her motion should have been reviewed fairly by both Courts.

The District Court erred on applying rule 56 (e), Fed. R. of Evid. 803(6); Akins v. Fulton County, Ga., 278 Fed. App'x 964, 968 (11 th Cir. 2008) to make its determination on this issue whether to Strike the respondents Exhibit A: Declaration of Marilyn Margolis. Margolis self-serving declaration was a statement, being offered as evidence for its truth, "not a sworn under oath testimony/affidavit". The Eleventh Circuit and District Court relied heavily on Margolis' declaration to support its determinations.

Petitioner believes that the rule of law that should have governed this issue to be Federal rules of Evidence; specifically, Rules 901 and 902. The District Court used Macuba v Deboer, 193 F.3d 1316, 1322-23 (11 th Cir. 1999) and the Federal Rules of Procedure 56(e). Petitioner believes that the Eleventh Circuit and Trail Court improperly erred as a matter of law in denying petitioner's Objection and Motion To Strike The Declaration of Marilyn Margolis.

The petitioner believes that this Courts standard in Reeves vs. Sanderson Plumbing Products, Inc., should have been followed by both Courts. "In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole." *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). And the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250—

251 (1986); see also *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.

In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 554—555 (1990); *Liberty Lobby, Inc., supra*, at 254; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n. 6 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby*, *supra*, at 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving

party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.*, at 300. Both courts evaluated, review, considered, and ruled on the petitioner's claims contrary tc this Courts established standards.

III. Certiorari should be granted because the opinion by the District Court and Eleventh Circuit conflicts and is inconsistent with the approach of this court in regards to determining race discrimination under Title VII and this Courts standard.

Petitioner believes that the framework in the McDonnel Douglas v. Corp. V. Green, 411 U.S. 792 (1973) was not applied in her case. Petitioner believes that both the Eleventh Circuit and the District Court applied the wrong framework in applying; especially, to the EC position. The District Court ruled,

"(3) suffered an adverse employment action; and (4) either was replaced by a person outside her protected class, or was treated less favorably that a similarly-situated individual outside her protected class." (Op. at 50) The Eleventh Circuit ruled, **"(2) She was subjected to an adverse employment action; (3) her employer treated similarly situated employees**

outside of her protected class more favorably than she was treated; (Op. at 8)

Both Courts state the reasons petitioner did not establish a prima facie in regards to the EC potion is because the position was never created; her claim in regards to the EC position are time barred; and she did not formally apply for the position. Again, both Courts failed to find, ignored and over looked petitioners evidence that it deemed authenticated. The respondent admits that Paula Funderburk held the position of Education Coordinator, although it told the Courts repeatedly that the position was never created. (R1-2-12) Furthermore, in petitioners response brief in opposition to summary judgment she showed the both Courts were Margolis admitted that she told petitioner when the EC position became open that Saunders would be able to interview for the position and Margolis answered yes. (Margolis Dep. at R10-136-p.25, lns. 10-13)

Pursuant to 28 U.S.C. § 1658 which was enacted on December 1, 1990, clearly states, " a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." Surprisingly, this Court of Appeal was the first to address this catchall 4-year statute of limitations issue via a Published opinion in Bruce Baker v. Birmingham Board of Education, June 25, 2008, so Saunders is not sure why the Eleventh Circuit has even made the above an issue. Furthermore, it has agreed with the U. S. Supreme Court in this matter, stating, "In *Jones*, 541 U.S. 369, 124 S. Ct. 1836, the Supreme Court applied a broad interpretation of 28 U.S.C. § 1658. The Court held that "a cause of action 'aris[es] under an Act of Congress enacted' after December 1, 1990—and therefore is governed by § 1658's 4-year statute of limitations—if the plaintiff's claim against the defendant was made possible by a post-1990 enactment." *Id.* at 382, 124 S. Ct. at 1845." (Bruce Baker v. Birmingham Board of Education, June 25, 2008)

*(Jones v. R.R. Donnelley & Sons CO.,*541 U.S. at 382, 124 S. Ct. at 1845) As Saunders supported with evidence in her reply brief pg. 21-22 she is within the 4 years statute of limitation. To petitioners understanding and her struggles to understand the law, the District Court and Eleventh Circuit improperly relies on Walker v. Prudential Pro. & Cas. Ins. Co., 286 F.3d 1270, 1275 (11 th Cir. 2002) and heavily relies on Margolis, out of Court, Declaration. In Walker, Conner was unaware of the plaintiff's existence, or interest in the positions; therefore, Walker could not make out her prima face case. The Walker case is factually different than Saunders case. Petitioners case is more factually related to Eleventh Circuit court precedent case Carmichael v. Birmingham Saw Works (11 th Cir. 1984) and Harris v. Birmingham Bd. Of Educ., 712 F.21377, 1383 (11 th Cir. 1983). The District Court and the Eleventh Circuit make light of the fact that the respondent lied to both of them in stating that the EC position did not exist and that Paula Funderburke was never hired in the

position. Respondent never did put forth a non discriminatory legitimate reason for hiring Funderburke over plaintiff for the EC position.

Respondent posted the EC position on 12/13/2002, but it did an employment requisition naming Funderburke the selected applicant "a day before" it posted the position on 12/12/2002. (R12-153-Ex. A, D03158) Respondent hired Funderburke for the position without posting the position. The above evidence was overlook as well.

District Court ruled that petitioner **did** meet her prima facie case in regards to the ANM position using the correct prima facie framework in this instance. (Op. at p.41) Eleventh Circuit states, "Emory concedes that Saunders established a prima facie case with respect to Acting Nurse Manager (ANM) position. (Op. at p. 8) Both Courts; however rule, "petitioner can still show discrimination if she shows that the respondent proffered legitimate non-discriminatory reason was actually a

pretext for discrimination ruling,

"A plaintiff must show that the disparities between the successful applicant's and her own qualification were of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." (District Court Op. at p.) and (Eleventh Circuit Op. at p. 13)

The District Court cited Brooks v. County Comm'n of Jefferson County, Ala., 446 F.3d 1160, 1163 (11 th Cir.. 2006 and the Eleventh Circuit cited Springer v. Convergys Customer Mgmt. Group Inc., 509 F.3d 1344, 1349 (11 th Cir. 2007) (quoting Cooper v. Southern Co., 390 F.3d 695, 732 (11 th Cir. 2004))

Petitioner believes that she has demonstrated pretext on qualifications alone showing that there are disparities in qualification were of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in questions. Petitioner did not just rely on the disparity in qualifications, but she put forth other probative evidence

as follows:

Petitioner presented legally sufficient evidence that *the District Court ignored, excluded, and failed to consider*. Petitioner put forth probative evidence through depositions and alike to show that the respondents reasons was pretextaul and unworthy of credence: (1) As Petitioner proved, Sampsel had NO ED management skills and very little clinical experience. (R14-156-6-11) (Appellant's Brief at 21-24) Petitioner also put forth evidence in the District Court that the defendant has repeatedly violated its own policies and procedures in hiring Sampsel for continues promotions without following its own six months of consecutive service requirement. (R14-156-11) (R10-140-Ehx.'s 10, 26, 52) Petitioner through evidence also put forth the material facts that the defendant has violated its policies and procedures for giving promotions and filing job vacancies and has done so in order to hire/promote jobs to less qualified white employees over more highly qualified and

experienced black employees. (R13-154-SAMF No.#'s 49, 89, 102) (R14-156) (R14-156-16-26)

Petitioner showed that the defendant's ED management positions are completely absent in diversity and it has never had a black RN in its nursing management or administrator positions within its ED located at Clifton Rd. (R14-156-11-12) (R10-136-p., 43., lns. 12-25; p., 44., lns.1-25; p. 8., lns. 14-16) (R10-134-59, 190-191) (R10-140-Exh. 1)

As stated on pg. 36-37 of Petitioner Appellant brief, respondent's and its, in house counsel, Elizabeth Clark-Morrison "Beth", "white female" fraudulently wrote the untrue behavioral issues, note to files, and a chronological work history which were illegally placed in Saunders HR an Department files.

As stated on pgs. 25-28 of Petitioner Appellant brief, the 6 panelist did not complete their interviewing packets

leaving the panel in conclusive. (R10-136-Ex.43 - interviewing packets)

As stated on pg. 19 and showing the evidence in Petitioner Appellant brief, nowhere on any of Petitioner yearly evaluation does it state Petitioner has a behavioral problem or negative communications with staff member; her evaluation stated the very opposite. The 2005 evaluation was authored be Marilyn Margolis herself nowhere does she say that Petitioner have behavioral or communications problem in the emergency room.

Also, see Petitioner response brief in opposition of defendant's motion for summary judgment. (R14-156-3-6) (R14-156-6-11) The above are a few reasons Saunders put forth to show that the respondent is pretextual.

The District Court failed to apply the proper legal standard and heavily relied on Margolis Declaration. It inferred and came to conclusions based on using respondents Margolis Declaration. In the Supreme Court

case Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S.Ct.2097, 2110 (2000), **this Court holds, " The court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witness." (citations omitted)** Furthermore, in Reeves it states, **"disregard all evidence favorable to the moving party that the jury is not required to believe."**

The Eleventh Circuit adopted the Reeves standards in Hinson v. Clinch County, 231 F.3d 821, 827 (11 th Cir 2000)

The District Court cites Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), but it does not apply the standard of Burdine. The District Court goes even further relying on an unprecedented case by the Eleventh Circuit Court; placing an improper burden on petitioner stating,

"Instead, the plaintiff must meet the employer's reason head on and rebut it." Osahar, 263 Fed. App'x at 762 (internal citations and quotation marks omitted) Quote reeves page 17 of order.

Specifically, this Courts ruling in Patterson states, "In doing so, petitioner is not limited to presenting evidence of a certain type. This is where the District Court erred. The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms. *See McDonnell Douglas, supra,* at 411 U. S. 804-805; *Furnco Construction Corp., supra,* at 438 U. S. 578; *cf. United States Postal Service Bd. of Governors v. Aikens,* 460 U. S. 711, 460 U. S. 714, n. 3 (1983). Indeed, she might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position." Patterson v. McLean Credit Union 491 U.S. 187-188 (1989) "Under this Court's decisions, qualifications evidence may suffice, at least in some circumstances, to show pretext. See *Patterson* v. *McLean Credit Union,* 491 U. S. 164, 187–188 (1989)

In Bass v. Bd. Of County Commissioners, the Eleventh Circuit clearly finds that evidence such as promotion of less qualified candidates, and deviation from standard procedures and statement by management concerning race-conscious efforts are sufficient to raise a genuine issue of material fact. (Bass v. Bd. Of County Commissioners, 242 F.3d 996 (11th Cir. 2001). Why could petitioner (Black) put forth her certain types before the Eleventh Circuit and get the same review of her claims and evidence from this Court of Appeals as did Bass (white) in the above case.

Interestingly, it is the Eleventh Circuits rulings that, "It is enough to conclude, as we do, that the actions about which Wideman complains considered collectively are sufficient to constitute prohibited discrimination. We need not and do not decide whether anything less than the totality of the alleged reprisals would be sufficient." Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11 th Cir. 1998) In Bass Eleventh circuit Court has also held

that, "While the other actions might not have individually rise to the level of adverse employment action under Title VII, when those actions are considered collectively, the total weight of them does constitute and adverse employment action." Bass v. County Commissioners (11 th Cir. 2001)

The District Court erred as a matter of law in failing to make determinations as to Petitioner Title VII 2000 et sec.,; and as amended civil rights act of 1991 on all (3) counts of her complaint; 42 U.S.C. 1981; and Constitution jury trial as request for action and relief in her Complaint.

IV. Certiorari should be granted because the opinion by the District Court and Eleventh Circuit conflicts and is inconsistent with the approach of this court in regards to determining retaliatory under Title VII and this Courts standard under Burlington N. & Santa Fe. Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415 (2006)

The petitioner listed several actions the respondent took against her in retaliation and the District Court group these actions into 3 different groups: formal discipline,

changes in job duties, responsibilities, and perks; and other allegations. **(Op. at 56, 59, and 62)** The Eleventh Circuit ruled since,

"The District Court divided possible retaliatory actions taken after the filing of Saunders' EEOC charge into two groups: formal discipline and changes in job duties asn perks. Because this is a convenient way to analyze Saunders' complaints, we will proceed in the same fashion." (Op. at p. 11)

As to the formal disciple group, the District court ruled, **"Plaintiff has stated a prima facie case of retaliation with respect to the formal discipline taken against her in 2005 and 2006. (Op. at pgs. 56-57)** The Eleventh Circuit ruled, **"Assuming, as the district court found, that formal disciplinary warning meeting might well dissuade a reasonable employee from making or supporting a charge of discrimination, the burden passed to Emory to articulate a legitmate non-retaliatory reason for the warning."**

As to the grouping both Courts ruled petitioner did not establish a prima facie case. (Eleventh Circuit Op. at pgs. 11-12) (District Court Op. at pgs. 59-63)

The Eleventh Circuit has ruled that, "It is enough to conclude, as we do, that the actions about which Wideman complains considered collectively are sufficient to constitute prohibited discrimination. We need not and do not decide

whether anything less than the totality of the alleged reprisals would be sufficient." Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11 th Cir. 1998) In Bass the Elventh Circuit Court has also held that, "While the other actions might not have individually rise to the level of adverse employment action under Title VII, when those actions are considered collectively, the total weight of them does constitute and adverse employment action." Bass v. County Commissioners (11 th Cir. 2001)

The respondent did not state any legitimate, non retaliatory reasons for its adverse employment actions suffered by the plaintiff in its brief or in its reply brief. (Rx-128-27-30)(RX-161-2-4) The evidence used to support defendant's motion for summary judgment, Margolis Declaration, only seeks to support it position on petitioners race discrimination claims, EC and ANM positions.

As petitioner demonstrated in her response brief, the following adverse employments actions were taken against the Petitioner after the she filed her complaints with EEOC:

(1) reducing the Petitioner duties from a RN Level IV Nurse to staff Nurse duties; the Petitioner was prevented from precepting nursing students or new nurses; no longer allowed to be an Educator for the Residency Program; relieved of her Charge Nurse duties. (Sampsel Dep. p. 105, Ins. 24-25; p. 106, Ins. 1- 18;p. 107, Ins. 15-20); (Pi. Dep., p. 87-88) The Petitioner was only allowed to do In- Services in the ED at large twice a year to meet her Level IV requirements when prior to Petitioner filing a EEOC charge the plaintiff did the In Services once or twice a month for the ED staff at large. Ms. Sampsel limited the Petitioner In-Service duties to the requirement after she was the Petitioner Supervisor. (Sampsel dep., p. 110, Ins. 24-25; p. 111); (2) the Petitioner holiday rotation schedule and shift schedule were changed and the Petitioner was denied holiday schedule, Exhibit B: (yellow slip denying holiday schedule);

Respondent took unjustified disciplinary actions against the Petitioner as also stated above; the Petitioner received

negative unjustified poor performance evaluations, (Sampsel Dep. Ex. 3) written reprimands, and denial of promotion, benefits and employment opportunities from the respondent. As stated above, Ms. Sampsel gave and assessed the Petitioner with (2-) on all her work performance relate dimensions for her 2006 evaluation which negatively affected plaintiff's future abilities for benefits, promotions and pay raises. Petitioner was also placed on an performance improvement plan. An employee future raise are affected by the employees work performance. (Sampsel Dep., p. 104, Ins. 24-25; p. 105, Ins. 1-13); (Sampsel Dep., p. 96, p. 97, Ins. 1-2) (Mitchell Dep., p. 43, Ins. 9-18; p. 45, Ins. 9-19) (Margolis Dep. Ex.'s 19 an 34)

There was a causal link between the petitioner protected activity and the adverse employments action. "To establish a causal connection, a petitioner must show that the decision makers were aware of the protected conduct, and that the protected activity and the adverse action were

not wholly unrelated." Gupta v. Florida Bd. Of Regents, 212 F.3d 590 (11 th Cir. 1997) and Raney v. Vinson Guard Service, Inc., 120 F.3d 1192, 1197 (11 th Cir. 1997) The awareness can be established by circumstantial evidence. Goldsmith v. City of Atmore, 996 F .2d 1155, 1163 (11 th Cir. 1993)

Petitioner clearly demonstrated to the District Court that the respondent was in the disciplinary counselings given to the plaintiff on December 14, 2005, and 1/26/2006, because Sharon Mitchell, Human Resource Manager, was in charge of responding to EEOC charges on behalf of the defendant at this time. (Mitchell Dep., Ex. 9)

After Petitioner filed her initial and her amended charges with EEOC for discrimination and retaliation, Petitioner was directed and told to attend a disciplinary counseling's meeting on 12/14/2005 by respondent. Margolis, Director of Nursing Emergency Services and Neuroscience, Sampsel, ED Department Director, and

Mitchell, Human Resources Manager; they told Saunders that she was being counseled, because they received 4 complaints about her from 3 new Nurses, and 1 Level IV nurse in the ED. When Petitioner asked who these 4 employees were, she was told that she could not know who they were and why they complained about her. First respondent told Petitioner that the meeting was about the 4 employees who complained about her and then Margolis said, out of no where, *"Let's talk about some of your behavior since you brought it up."* When petitioner tried to tell the Human Resources Manager, Mitchell, that she was not counseled or reprimand for alleged incidents that Margolis and Sampsel was stating in the meeting, Mitchell stated to Saunders, "they are telling you about it now." (R10-140-Ex. 71- listen to audiotape)

At the 12/14/2005 disciplinary counseling, Petitioner was given her 1st official counseling, and a formal written warning which required her to attend the Person To Person Communication course for employees

with behavioral problems on the job. It was demeaning, degrading, painful and humiliating for the petitioner and she did not do anything to warrant it. (talk about being on sick leave) Saunders was told to sign the Employee Corrective Disciplinary Action form, she refused, and was told that the form would go into her department and Human Resources files. (R10-140-Ex.'s 12 and 13) (Listen to audio tape of counseling)

In the second meeting on 1/26/06, Petitioner was told by Sampsel, Sam Shartar, Nurse Manager, and Margolis, and Mitchell, that two staff employees, Peggy Patterson, RN and Shane Pierce, RN had complained about Petitioner performance in the ED. They told petitioner that she had a negative communication style. The two employees above are the same employees out of the 4 complainers who lodge complaints against petitioner on December 14, 2005. Petitioner was given a verbal warning and told that it would go into her personnel file. Prior to the disciplinary counseling on

01/26/2006, Petitioner e-mailed Shartar about an incident on 1/18/2006 in regards to Shane Pierce.

V. Certiorari should be granted because District Court and Eleventh Circuit failed to recognize this Courts approach in deciding actionable conduct in determining a hostile work environment under this Court standard in Harris v Forklift Systems, Inc.,

The District Court erred when it only considered two groupings of conduct by both the employer, Agents, and co-employees and it did not consider all evidence and reasonable factual inferences drawn there from in a light most favorable to the non-moving party on petitioners hostile work environment. Throughout petitioner's response brief, she showed the District Court through evidence that the respondent, its agents, upper management, co-employees actions cumulated into tangible employment actions against her.

The Supreme Court has held that, "We directed courts to determine whether an environment is sufficiently hostile or abusive by "looking at all the circumstances,

"including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v Forklift Systems, Inc., 510 U.S. 23 (1993) Although the District Court quotes Harris v. Forklift Systems, Inc., it did not apply it to plaintiff's case.

Respondent had an opportunity to give an affirmative defense in regards to plaintiff's hostile work environment claim, but it never did. (R-128-15-18)(R-161-1-2

As petitioner stated in both briefs, but the evidence was ignored by the District Court: the 4 RN's who wrote complaints against petitioner worked on the same shift. Three of them wrote the complaints against petitioner to Sampsel and Margolis on the same date 11/27/2005 within minutes of each other, 7:49 pm, 8:04 pm, and 8:09 pm and on 11/28/05 at 4:55 am in the morning. In an exchange from the 4 RN's who complained about petitioner to Margolis,

Margolis, Director of ED on 11/27/2005, the same day, via e-mail replies to the new graduate RN's who complained about petitioner, stating, *"Not everyone acts correctly ever day, but we have their back because they are* ***our*** *team, our family."* Margolis goes on to state to another complainer, *"Keep up the great work, and keep those cards and e-mails coming. Thanks. Marilyn. P.s. Just wanted to let you know that we all have your malady of the fast fingers!!* (R10-136-Ex.' s 12, 13, 14) (R10-136-79) Margolis replies to the 3rd complainer "white female", Heather Kalm stating, *"We want to retain you and satify your need to grow. ", "You are the type of staff* ***we want to clone*** *and short of that, at least keep you engaged and happy in the environment."* **T**he senior nurse exchange with Margolis states, "I *guess it would be safe to say that* I *think you received a few e mails from the staff this weekend regarding Belinda and her continued behavior. "* (R10-136-Ex.'s 12, 13, and 14, No. 000661)

As petitioner further showed evidence of the

hostile work environment that other Black RN Nurses felt they were being subjected to a racist work environment by putting forth an e-mail in which Hazel Parker e-mailed the ED at large including to upper management complaining about defaming pictures of black RN's on the opportunity for improvement board, and the discriminatory environment in the EHC's ED located in the ED at Clifton road. (R10-140-Ex's 2, 3, 4, and14)

The ED environment became, so hostile for petitioner that she suffered a stroke while working in EHC's ED. (Pl. Dep. pp. 204 and 205) (R10-156-34)

Furthermore petitioner subjectively felt the environment was racially discriminatory as she pointed out in her deposition as evidence to this Court and to the District Court. (Pl. Dep. pp. 107-114) (Pl. Dep. pp. 202-214)

In the evidence it clearly states that petitioner, "Every time they call me up, they harass me, humiliated

petitioner, and put her through all kinds of negative changes. (Pl. Dep. pp. 177-178)

This Court does not have to search for any evidence, because 99% of the evidence pertaining to her claims can be orderly found in the 4 depositions.

As petitioner stated in her initial brief, the District Court quoted Harris, but did not apply the standard in Harris; therefore, it erred as a matter of law in its determination and conclusions on petitioners Harassment claim. This Court in Harris clearly states that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances." "We direct courts to determine whether an environment is sufficiently hostile or abusive by looking at all the circumstances."

Petitioner is Pro Se litigant, and she believes that the summary judgment and McDonnell Douglas frameworks were not followed by the District Court pursuant to the rule of law, because respondnet, at the

APPEALS stage is stating that it did not have to present an affirmative defends to Saunders harassment claim, It states, "*in light of the fact that the District Court found that Saunders could not assert a prima facie case of racial harassment such that the burden of production never shifted to Defendant.*" Defendant states it offered affirmative defenses in its Answer, but the District Court makes no reference in its order to these affirmative defenses filed almost 1 year before it filed it motion for summary judgment. At summary judgment, defendant cannot rest on its pleading alone; it has to show that there are no disputed facts, so how then did both Courts rule in the respondents favor on all petitioner claims when petitioner clearly showed evidence and facts to the contrary.

Certiorari should be granted because the District Court and Eleventh Circuit have so far departed from the accepted and usual course of judicial proceedings in its

impartial; procedural improprieties and mismanagement of the proceedings/case it has caused a miscarriage of justice.

CONCLUSION

The petitioner proceeds before this Court pro se, so the petitioner asks this Court for leniency in reviewing this request for Writ of Certiorari. Petitioner is not an attorney, but petitioner believes based on the above, the court of appeals, and district court have not followed the precedent standards of this Court or statutory laws on the above issues already established; therefore, review by this Court is warranted and petitioner respectfully asks that this petition for a writ of certiorari be granted and grant petitioner such other relief as the Court deems just and proper.

Respectfully Submitted,

Belinda Saunders, *Pro Se*

Date: 10/21/10

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No.

In The

Supreme Court of the United States

Belinda Saunders,

Petitioner,

v.

Emory Healthcare, Inc.

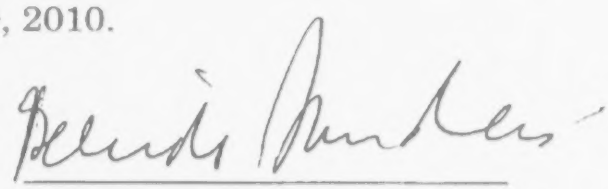
Respondent.

CERTIFICATE OF SERVICE

I, Belinda Saunders, Pro Se petitioner, do swear and declare that on this date, 21st day of October 2010, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid to John S. Snelling, Georgia Bar No. 665759 and Toni J. Read, Georgia Bar No.

140982, of Duane Morris, LLP., 1180 West Peachtree Street NW, Suite 700, Atlanta, Georgia 30309, 404-253-6927 Counsel for the Respondent. I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 21st, 2010.



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(2)

Supreme Court, U.S.
FILED

OCT 22 2010

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No. 10-558

In The

Supreme Court of the United States

Belinda Saunders,

Petitioner,

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Respondent.

APPENDIX "A"

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 09-10283 & 09-11530
Non-Argument Calendar

D. C. Docket No. 07-00282-CV-WSD-1

BELINDA SAUNDERS,

Plaintiff-Appellant,

versus

EMORY HEALTHCARE, INC.,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Georgia

(January 11, 2010)

Before TJOFLAT, WILSON and ANDERSON, Circuit Judges.
PER CURIAM:

Belinda Saunders, proceeding pro se, appeals from the district court's order granting summary judgment to Emory Healthcare Inc. ("Emory") in her employment

discrimination action, brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981. On appeal, Saunders argues that the district court erred by (1) denying her motion to strike a declaration attached to Emory's summary judgment motion, (2) granting in part Emory's motion to strike unauthenticated documents attached to her summary judgment response, and (3) granting Emory summary judgment on her racial discrimination, retaliation, and hostile work environment claims. After a review of the record and the parties' briefs, we affirm.

We review district court's rulings regarding the admission of evidence deferentially, testing for an abuse of discretion. Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1276 (11th Cir. 2008). "We will not overturn an evidentiary ruling unless the moving party establishes a substantial prejudicial effect." Id.

Appendix A

We review the grant of summary judgment de novo. Rioux v. City of Atlanta, Ga., 520 F.3d 1269, 1274 (11th Cir. 2008). "Summary judgment is rendered 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. (quoting Fed. R. Civ. P. 56(c)). "In making this assessment, the Court must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party, and must resolve all reasonable doubts about the facts in favor of the non-movant." Id. (quotation marks and citations omitted).

I. Evidentiary Rulings

The district court's denial of Saunders' motion to strike the Margolis Declaration was not an abuse of discretion. Margolis testified from personal knowledge as

required by Fed. R. Civ. P. 56(e). Saunders contends that the Declaration is inadmissible hearsay that cannot be properly considered on a motion for summary judgment, but concedes that under Fed. R. Civ. P. 56(e) and Macuba v. Deboer, 193 F.3d 1316 (11th Cir. 1999), affidavits and statements that would constitute hearsay, if reducible to admissible evidence, may be properly considered in support of a motion for summary judgment. In Macuba, this Court stated that "a district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form." Id. at 1323 (internal quotation marks omitted). As the district court correctly concluded, any documents attached to the Declaration are either non-hearsay or could be reduced to admissible form.

Saunders' further arguments are unavailing. Saunders argues that the district court erred by requiring

her to file an affidavit to dispute the Margolis Declaration. Saunders misapprehends the district court's statement that Saunders was permitted to submit affidavits disputing the Margolis Declaration. To the extent that Saunders argues that the Margolis Declaration should have been stricken based on inconsistencies with the record, Saunders has not supported that argument. Therefore, the district court did abuse its discretion by refusing to strike the Margolis Declaration. Saunders argues that Exhibits 9-35 of her own deposition should be stricken. Because Saunders' motion to strike focused only on the Margolis Declaration and not Exhibits 9-35, this Court will not consider that argument for the first time on appeal. See Bryant v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009) ("It is well established in this circuit that, absent extraordinary circumstances, legal theories and arguments not raised squarely before the district court cannot be broached for the first time on appeal.").

Appendix A

The district court's decision to grant in part Emory's motion to strike Saunders' unauthenticated exhibits was not an abuse of discretion. To be admissible in support of or in opposition to a motion for summary judgment, a document must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 2722, at 382-84 (3d ed. 1998). Because the exhibits were not properly authenticated, the district court was not required to consider them in opposition to Emory's motion for summary judgment. Moreover, many of the stricken exhibits were authenticated by either Emory or deponents in the case; therefore, striking Saunders' exhibits did not cause a substantial prejudicial effect. Because Saunders' exhibits were not properly authenticated and the decision to strike them did not cause

a substantial prejudicial effect, the district court did not abuse its discretion by striking the exhibits.

II. Discriminatory Hiring

"Racial discrimination claims based on circumstantial evidence are evaluated under the McDonnell Douglas burden shifting framework." Burke- Fowler v. Orange County, Fla., 447 F.3d 1319, 1323 (11th Cir. 2006). A plaintiff establishes a prima facie case of disparate treatment by showing that: "(1) she is a member of a protected class; (2) she was subjected to an adverse employment action; (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated; and (4) she was qualified to do the job." Id. Once the plaintiff establishes a prima facie case, "then the defendant must show a legitimate, non-discriminatory reason for its employment action." Id. Once the defendant meets that burden, "then the plaintiff must

prove that the reason provided by the defendant is a pretext for unlawful discrimination." Id.

A. CNS Position

Saunders concedes in her brief that the Clinical Nurse Specialist (CNS) position is not in dispute in this case. Therefore, she has waived any argument that Emory engaged in discrimination with regard to that position.

B. EC Position

The weight of the record indicates that the Educational Coordinator (EC) position was never created. Saunders, however, appears to contend that the CNS position, posted in December 2002 and filled in March 2003, was actually the EC position. In support, she cites Emory's admission in its Answer that "Paula Funderburke held the position of Education Coordinator." Regardless of the title of the position, it is undisputed that Saunders did not formally apply for the position posted in December 2002.

Moreover, even assuming that a general issue of material fact remains as to whether the EC position was created, Saunders' claims in regard to the position are time barred.

In its motion for summary judgment, Emory argued that, assuming the position posted in December 2002 and filled in March 2003 was the EC and not the CNS position, Saunders' claims under Title VII and § 1981 are barred. Saunders does not dispute that any claim relating to that position arising under Title VII is time barred and thus has abandoned that claim. Furthermore, any claim relating to that position arising under § 1981 is time barred.

Claims cognizable under § 1981 prior to the Civil Rights Act of 1991 are subject to the state statute of limitations for personal injury torts. See Moore v. Liberty Nat. Life Ins. Co., 267 F.3d 1209, 1219 (11th Cir. 2001). Because Saunders' failure-to-promote claim was cognizable under § 1981 prior to the Civil Rights Act of 1991, Georgia's two-year statute of limitations for personal

injury torts applies. See O.C.G.A. § 9-3-33 (2007). The position was posted in December 2002 and filled in March 2003. Saunders filed her complaint on December 26, 2006. Because Saunders did not file her complaint within the two-year statute of limitations, any claim under § 1981 is time barred.

C. NDD Position

Saunders does not challenge the district court's finding that she failed to establish a prima facie case of discrimination related to this position because she did not apply for the position. See Walker v. Prudential Prop. & Cas. Ins. Co., 286 F.3d 1270, 1275 (11th Cir. 2002) (requiring plaintiff show that "she applied for and was qualified for an available position" to establish adverse employment action in failure-to-hire context) . Therefore, Saunders has waived any argument relating to this position on appeal.

Appendix A

D. ANM Position

Emory concedes that Saunders established a prima facie case with respect to the Acting Nurse Manager (ANM) position. Emory has proferred a legitimate nondiscriminatory reason for its decision, namely that the interview panelists for the position unanimously rated Sampsel higher based on her better communication and leadership skills and because she lacked the disciplinary record that Saunders had amassed. Saunders claims the disparity in qualifications between herself and Sampsel and Emory's failure to follow its hiring policies demonstrate that Emory's proferred reason is pretextual.

"[A] reason is not pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." Springer v. Convergys Customer Mgmt. Group Inc., 509 F.3d 1344, 1349 (11th Cir. 2007) (internal quotation marks omitted). In the context of promotions, we have held that

"a plaintiff must show that the disparities between the successful applicant's and his own qualifications were 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.'" Id. (quoting Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004)). "Standing alone, deviation from a company policy does not demonstrate discriminatory animus." Mitchell v. USBI Co., 186 F.3d 1352, 1355-56 (11th Cir. 1999).

Saunders has failed to demonstrate that Emory's proferred reason is pretextual. Emory's decision to waive the minimum years of clinical experience requirement in Sampsel's favor and to prefer Sampsel over Saunders in spite of the fact that Saunders had more clinical experience was reasonable in light of the evidence showing that Sampsel was better qualified in terms of communication,

leadership, and workplace behavior, skills of great importance in a management position. Therefore, Saunders has failed to demonstrate that Emory's proferred reason is false. Moreover, Saunders has failed to produce any evidence indicating that discrimination was the actual reason behind the decision to hire Sampsel.

III. Retaliation

"To establish a claim of retaliation under Title VII or section 1981, a plaintiff must prove that [s]he engaged in statutorily protected activity, [s]he suffered a materially adverse action, and there was some causal relation between the two events." Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1277 (11th Cir. 2008). "After the plaintiff has established the elements of a claim, the employer has an opportunity to articulate a legitimate, nonretaliatory reason for the challenged employment action as an affirmative defense to liability." Id. "The plaintiff bears the ultimate burden of proving retaliation by a preponderance

of the evidence and that the reason provided by the employer is a pretext for prohibited retaliatory conduct." Id.

The scope of "adverse employment actions" is broader in the anti-retaliation context than in the anti-discrimination context. In the anti-retaliation context, adverse employment actions are those that might dissuade a reasonable worker from making or supporting a charge of discrimination. Burlington N. & Santa Fe. Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415 (2006). This Court recognized in Crawford v. Carroll, 529 F.3d 961, 973-74 (11th Cir. 2008), that Burlington Northern broadened the type of conduct actionable in a retaliation claim and effectively rejected our previous requirement of showing an ultimate employment decision or substantial employment action to establish an adverse action for a retaliation claim. In order to establish the necessary causal link, "a

plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." Goldsmith, 513 F.3d at 1278 (quotation marks omitted).

The district court divided possible retaliatory actions taken after the filing of Saunders' EEOC charge into two groups: formal discipline and changes in job duties and perks. Because this is a convenient way to analyze Saunders' complaints, we will proceed in the same fashion.

A. Formal Warnings

Saunders contends that she was subjected to disciplinary warning meetings in December 2005 and January 2006 in retaliation for filing her initial EEOC charge. Assuming, as the district court found, that formal disciplinary warning meetings might well dissuade a reasonable employee from making or supporting a

charge of discrimination, the burden passed to Emory to articulate a legitimate non-retaliatory reason for the warnings. The record supports Emory's claim that the meetings were motivated by numerous complaints about Saunders' workplace performance or attitude. Saunders has produced no evidence indicating the proffered reason is pretextual. The four month time lag between the filing of her complaint with the EEOC and the disciplinary warning meetings, especially standing alone, is far too attenuated to support the inference that Emory's articulated reason is actually pretext for prohibited retaliation.

B. Changes in Job Duties and Perks

Saunders also contends that she suffered a decrease in the frequency with which she performed charge nurse, in-service, and precepting duties and changes to her holiday and vacation schedule in retaliation for filing her initial EEOC charge. It is undisputed that the schedule

changes were applied not just to Saunders but to all part-time nurses in the emergency department; therefore, Emory has proferred a non-retaliatory reason for the changes in Saunders' schedule. Saunders has no produced no evidence indicating that Emory's proferred reason is pretext for illegal retaliation. It is also undisputed that the decrease in certain duties has not resulted in tangible effects such as a decrease in pay or failure to maintain her current certification. In the wake of Burlington Northern, however, the employer's conduct need not reach the level of an ultimate or substantial employment action to constitute actionable adverse conduct. The conduct only need be serious enough that it might dissuade a reasonable worker from making or supporting a charge of discrimination.

The Supreme Court's discussion in Burlington Northern provides some insight into when an employer's conduct might dissuade a reasonable worker from

making or supporting a charge of discrimination. In Burlington Northern, the Supreme Court concluded that even a total "reassignment of job duties is not automatically actionable." 548 U.S. at 71; 126 S. Ct. at 2417. Discussing reassignments, the Court indicated that the nature of work being performed or the necessity of greater qualifications for certain duties was relevant to whether a reassignment was actionable. Id. In this case, Saunders has not suffered a total reassignment, but simply a decrease in certain responsibilities. There is no evidence that she has been assigned more difficult or arduous work in lieu of these responsibilities. Furthermore, the record indicates that these responsibilities are part of the normal duties of a Level IV registered nurse; there is no evidence that these responsibilities require greater qualifications or carry greater prestige than

any of the other duties of a Level IV registered nurse. Because this slight decrease in the frequency with which Saunders performs certain job responsibilities does not rise to the level of actionable retaliation, Saunders cannot establish a prima facie case based on those actions.[1]

IV. Hostile Work Environment

Title VII protects workers from a "workplace . . . permeated with'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 370 (1993) (citation omitted). "This court has repeatedly instructed that a plaintiff wishing to establish a hostile work environment

[1] We also note that there is no evidence supporting Saunders' further allegations that she was subjected to constructive discharge, was denied the opportunity to apply for a promotion because she was placed on a "Performance Improvement Plan," or received poor performance appraisals.

claim show: (1) that [s]he belongs to a protected group; (2) that [s]he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as national origin; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability." Miller v. Kentworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002). In order to be actionable, the conduct in question must be "severe or pervasive enough to create an objectively hostile or abusive work environment–an environment that a reasonable person would find hostile or abusive." Harris, 510 U.S. at 21, 114 S. Ct. at 370. Moreover, the plaintiff must "subjectively perceive

the environment to be abusive." Id. "In evaluating the objective severity of the harassment, we consider, among other factors: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." Miller, 277 F.3d at 1276.

The only conduct clearly presented by Saunders' for our consideration on this claim is three black-and-white motivational signs allegedly posted in employee areas and complaints made against Saunders by other employees. Saunders has presented no evidence that would allow a reasonable juror to conclude the signs are objectively racially harassing. First, it is hardly clear from the record that the signs are intended to depict black nurses at all. Second, assuming they do, the signs do not display any racially offensive motivation. Thus, it is

impossible for the signs to be "severe or pervasive" enough to create an objectively hostile or abusive work environment. Saunders has also presented no evidence that would indicate that the complaints from other employees were based on her race. The record indicates that these complaints were directed towards Saunders' workplace behavior and attitude toward others without any reference to race. Moreover, Saunders concedes that she has not been subjected to any racially offensive comments. Because the complained of conduct is either not based on Saunders' race or not severe or pervasive enough to create an objectively hostile or abusive work environment, the district court did not err by entering summary judgment against Saunders on her hostile work environment claim.

In this case, Saunders has not identified any basis for disturbing the district court's judgment. Accordingly, we affirm the grant of summary judgment in favor of Emory.

AFFIRMED.

Supreme Court, U.S.
FILED

10-558 OCT 22 2010

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Belinda Saunders,

Petitioner,

v.

Emory Healthcare, Inc.

Respondent.

APPENDIX "B"

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Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BELINDA SAUNDERS,

Plaintiff,

v.

1:07-cv-0282-WSD

EMORY HEALTHCARE, INC.,

Defendant.

OPINION AND ORDER

Plaintiff Belinda Saunders ("Plaintiff") sued her employer, Emory Healthcare, Inc. ("Defendant"), for racial discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). 42 U.S.C. §§ 2000e, et seq. The matter is before the Court on the Defendant's Motion for Summary Judgment [128]. The matter is also before the Court on several miscellaneous motions including Plaintiff's Motion to Stay [148], Plaintiff's Motion

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to Strike [152], Defendant's Motions to Strike [157, 159], and Plaintiff's Motion for Extension of Time [164].

I. PROCEDURAL BACKGROUND AND PRELIMINARY MOTIONS

Before addressing the primary factual and legal arguments on summary judgment, the Court must address the procedural posture of this case and several ancillary motions related to the record.

Plaintiff, an African-American female, alleges that the Defendant engaged in racial discrimination and wrongful retaliation, and she asserts her discrimination claims created a hostile work environment. Plaintiff filed this suit in the Superior Court of DeKalb County, Georgia on December 26, 2006. Defendant removed the case to this Court on January 31, 2007. Under the Court's local rules, discovery matters in this case were referred to Magistrate Judge Brill. On May 22, 2007, Plaintiff communicated *ex parte* with Magistrate Judge Brill, complaining about

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he performance of her initial attorney, Neal Callahan of
/aldrep, Mullin & Callahan. On June 26, 2007, Plaintiff
ərminated her representation by Mr. Callahan. Curtis
/illiams of Molden, Holley, Fergusson, Thompson & Heard
ɛgan representing Plaintiff the next day.

On August 31, 2007, Plaintiff suffered what she
haracterized as a mild stroke. As explained below, Plaintiff
s currently on leave from her employment with Defendant.
n October 9, 2007, Plaintiff's second counsel, Mr.
/illiams, moved to withdraw with Plaintiff's consent.
agistrate Judge Brill granted the withdrawal on October
3, 2007. Plaintiff is currently proceeding in this action
o se.

The parties to this litigation have been involved for
ɔme time in protracted discovery and legal disputes. Judge
rill addressed several of the discovery disputes, many of
hich involved extensions Plaintiff sought in the time for

scheduling her deposition. Plaintiff filed additional discovery motions, sought expedited review, and moved for Judge Brill's recusal.

On February 22, 2008, the Court denied Plaintiff's motion to recuse Judge Brill and denied-in-part the several discovery motions then pending [98]. Plaintiff appealed this Order to the Eleventh Circuit [101].[1] On March 13, 2008, the Court held a hearing to address the several outstanding discovery issues that were not resolved in the Court's February 22, 2008 Order – primarily when Plaintiff would consent to sit for a deposition [105]. On April 10, 2008, the Court entered an Order addressing these matters and setting a date for the close of discovery [116].

On May 30, 2008, the Defendant moved for summary judgment [128]. On July 9, 2008, the Court was advised

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[1] 1 On May 2, 2008, the Eleventh Circuit dismissed Plaintiff's appeal *sua sponte* for lack of jurisdiction [119].

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hat Plaintiff had filed for Chapter 7 bankruptcy protection n the United States Bankruptcy Court for the Northern)istrict of Georgia on March 28, 2008 [144]. The ankruptcy Court appointed a trustee in bankruptcy for laintiff, who retained C. Andrew Head as special ounsel to represent Plaintiff's bankruptcy estate in this itigation. On July 9, 2008, the Court and the parties in this ase were advised that Plaintiff's bankruptcy rustee has been substituted as the real party in interest in his action [144]. Plaintiff's bankruptcy trustee sought an xtension in the time to respond to the pending summary dgment motion [145]. The motion was granted by the ourt.

On July 11, 2008, Plaintiff's bankruptcy trustee filed memorandum in opposition to the Defendant's summary dgment motion [146, 147]. On July 25, 2008, Defendant led its reply to the bankruptcy trustee's response [149].

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On July 23, 2008, Plaintiff filed what she captioned as an opposition to the participation in this action by her bankruptcy trustee and a motion to stay proceedings in this case until the termination of her Chapter 7 suit [148].

On October 6, 2008, Plaintiff filed a motion to strike the Declaration of Marilyn Margolis, attached to the Defendant's motion for summary judgment, and several of the Defendant's exhibits [152]. Plaintiff, acting *pro se*, filed her own memorandum in opposition to the Defendant's motion for summary judgment [153-156]. Plaintiff's filings on the summary judgment motion are voluminous in the extreme.[2]

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[2] Plaintiff filed a 14-page declaration with over 100 pages of exhibits [153]. Plaintiff filed a 79-page statement of additional material facts she contends are relevant to this case identifying 193 purported additional material facts [154]. Plaintiff's response to the Defendant's statement of undisputed material facts, itself 66 pages long, adds as attachments 300 pages of unauthenticated exhibits. Finally, Plaintiff's response brief, for which she had already received a 10-page extension, has attached to it over 600 hundred pages of disorderly, unauthenticated exhibits.

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On October 7, 2008, Plaintiff's bankruptcy trustee filed a notice that Plaintiff's Chapter 7 bankruptcy case had been dismissed by the bankruptcy court and that Plaintiff should be re-substituted as the real party in interest in this action [151].

On October 8, 2008, the Defendant filed a motion to strike the Plaintiff's response and motion to strike as untimely. Alternatively, Defendant requested that the Court strike the briefing of Plaintiff's bankruptcy trustee based on its inconsistency with the Plaintiff's positions [157].

On October 9, 2008, the Court approved the re-substitution of the Plaintiff as the real party in interest [158].

On October 20, 2008, the Defendant moved to strike for lack of authentication the exhibits filed by Plaintiff as attachments to her summary